FILE COPY

FILED
OCT 19 1935
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 20.

RAYBESTOS-MANHATTAN, INC., *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

PETITIONER'S SUPPLEMENTAL BRIEF.

CHARLES H. LEFEVRE,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statute and Regulations Involved	2
Summary Statement of the Case	2
Summary of Argument	3
Argument	4
(1) The tax is contrary to the Treasury Regulations	4
(2) The statute taxes the transfer of "legal title . . . to rights . . . to receive" shares of stock	5
Conclusion	30
Appendix A	32
Appendix B	36

Table of Authorities Cited.

Cases.

Anthony v. American Glucose Co., 146 N. Y. 407, 41 N. E. 23	18
Billings v. United States, 232 U. S. 261	25
Brewster v. Gage, 280 U. S. 327	5, 7
Clicquot Club Co. v. United States, 13 F. (2d) 655	22
Consolidated Equities v. White, 9 F. Supp. 145	29
Coos Bay Lumber Co. v. McLaughlin, No. 19,268-K (N.D. Cal.)	29
Fletcher v. Newark Telephone Co., 55 N. J. E. 47, 35 Atl. 903	16
Flint v. Stone-Tracy Co., 220 U. S. 107	21
Hormel & Co. v. United States, 10 F. Supp. 623	29
International Paper Co. v. State, 206 N. Y. S. 57	12
Knowlton v. Moore, 178 U. S. 41	22
Marconi Wireless Telegraph Co. v. Duffy, 273 Fed. 197	29
Minnesota Mining & Mfg. Co. v. Willcuts, 2 F. Supp. 789	26

Page

Murphy Oil Co. v. Burnet, 287 U. S. 299 5,7
Nicol v. Ames, 173 U. S. 509 22
People v. Duffy-McInnerney Co., 106 N. Y. Supp. 878, 879; 122 App. Div. 336 31
Rockefeller v. United States, 257 U. S. 176 30
Raybestos-Manhattan v. United States, 10 F. Supp. 130 1
Shreveport-El Dorado Pipe Line Co. v. McGrawl, 63 F. (2) 202 28
Thomas v. United States, 192 U. S. 363 21
Union Trust Co. v. Heiner, 26 F. (2d) 391 12
United States v. Brown Fence Co., 9 F. Supp. 1008 .. 30
United States Radiator Corporation v. State, 208 N. Y. 144, 101 N. E. 783 12
U. S. v. Dakota-Montana Oil Co., 288 U. S. 459 5,7
United States v. Isham, 17 Wall. 496 23
United States v. Phellis, 257 U. S. 156 30
Vortex Cup Company v. United States, 1935 C. C. H. Par. 9582 29
Westmoreland Coal Co. v. MacLaughlin, 8 F. Supp. 963 ..... 8, 9, 27

Statutes.

Revenue Act of 1926, 44 Stat. 9, Section 800 ..... 2, 11
Revenue Act of 1932 4
Section 723 (a) 5

Miscellaneous.

O. D. 176, S. T. 10-21-320 7
Regulations 71 4
General Corporation Law of Connecticut:
Section 3384, Chapter 191 9
Business Corporation Law of Pennsylvania:
Section 302, Article III 9
Section 311, Article III 9

IN THE

Supreme Court of the United States

THE OCTOBER TERM, 1935.

No. 20.

RAYBESTOS-MANHATTAN, INC., *Petitioner*,

v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

PETITIONER'S SUPPLEMENTAL BRIEF.

OPINION BELOW.

The opinion of the court below (R. 76-79) is reported in 10 F. Supp. 130.

JURISDICTION.

The judgment of the court below was entered March 4, 1935 (R. 80). The petition for a writ of certiorari was filed April 6, 1935 (R. 94), and was granted May 20, 1935

(R. 94). The jurisdiction of this Court rests on Section 3(b) of the Act of February 13, 1925.

QUESTION PRESENTED.

The question is whether under Section 800, Schedule A-3, of the Revenue Act of 1926 a transfer tax was incurred by petitioner where petitioner had acquired the assets and assumed the liabilities of three corporations in consideration of petitioner issuing shares of petitioner's stock direct to the stockholders of the three corporations.

STATUTE AND REGULATIONS INVOLVED.

The applicable statute and regulations of the Treasury Department are set forth in the Appendix B, *infra*, pages 36-40.

SUMMARY STATEMENT OF THE CASE.

The facts when stripped of detail and summarized are:

In 1929 under a "Plan and Agreement" of reorganization, The Manhattan Rubber Manufacturing Company was merged with and The Raybestos Company and United States Asbestos Companies were consolidated into petitioner, Raybestos-Manhattan, Inc. The three old corporations agreed to transfer their assets together with their liabilities to the new corporation (petitioner) in consideration of the latter issuing its shares directly to the stockholders of the old corporations who agreed to surrender their old stock upon receiving in replacement therefor stock in the new corporation. The issuance tax of 5c per share was paid by petitioner, the new corporation, and is not here in issue.

The Commissioner has held that there was no transfer from the Manhattan Company to its stockholders of the right to receive petitioner's stock, but has held that there was a transfer from The Raybestos Company and the

United States Asbestos Company to their stockholders of the right to receive petitioner's stock. This second tax of 2c per share upon the fiction of alleged transfers of the right to receive petitioner's stock to the stockholders of The Raybestos Company and United States Asbestos Companies, and which petitioner paid, is here in issue.

For the convenience of the Court a more complete summary of the facts is set out in Appendix A, *infra*, pp. 32-35.

SUMMARY OF ARGUMENT.

There is no basis for the imposition of the tax for the reasons that:

(1) The tax is contrary to the Treasury Regulations.

(2) The statute taxes the transfer of "legal title . . . to rights . . . to receive" shares of stock. (a) The imposition of the tax is purported to be justified by the adoption of the fiction of a transfer having occurred. (b) No such transfer actually occurred.

(3) The right to receive the new shares vested in the stockholders from the moment of its inception, and the agreement for the conveyance of the assets negatived any right of the corporations to receive the stock. No transfer of legal title to a right to receive could have been made by corporations which never had that right to persons who enjoyed it from the moment it came into existence.

(4) The stamp transfer tax is an excise tax levied upon the privilege of making a transfer from one person to another. If no privilege be exercised, and no transfer be made, there is nothing to which the tax can attach. No liability can arise without an actual transfer as distinguished from a constructive or implied or hypothetical one.

(5) Cases involving this precise question have held that no tax was possible.

ARGUMENT.

There is no basis for the imposition of the tax.

(1) The tax is contrary to the Treasury Regulations.

Article 35 of Regulation 71 (set out in Appendix B, *infra*, pp. 36-40), in effect in 1929, as pertinent to the issue here, reads as follows:

> Sales and transfers not subject to tax.—The following transactions are not subject to the tax:
>
> * * * * * * * * *
>
> (d) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.
>
> (e) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger is not subject to tax, nor is the substitution of new certificates for the certificates representing the old stock of the merging corporation.

The Government abided by the provisions of subsection (e), above, when it refrained from assessing a stamp transfer tax upon petitioner issuing its shares to stockholders of The Manhattan Rubber Manufacturing Company in exchange for their shares in that Company, but, it violated the provisions of subsection (d), above, when it imposed transfer taxes upon petitioner issuing its shares to stockholders of The Raybestos Company and the United States Asbestos Company, respectively, upon surrender of their stock in exchange for stock in the consolidated corporation. The regulation has the force of law and should be followed in this case. Article 35 of Regulations 71 was again promulgated in Article 35 of the 1932 edition of Regulations 71. The pertinent portion of the language of Schedule A-3 of Title VIII of the Revenue Act of 1926 was not changed

when that schedule was amended by section 723(a) of the Revenue Act of 1932, and the controlling provisions of Regulations 71, as above quoted have obtained legislative and administrative approval. *Brewster* v. *Gage*, 280 U. S. 327; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *U. S.* v. *Dakota-Montana Oil Co.*, 288 U. S. 459.

It is to be noted that by the regulations it is the "transaction" that is not subject to the tax on the "surrender of the stock."

(2) The statute taxes the transfer of "legal title . . . . to rights . . . to receive" shares of stock.

(a) The Government purports to justify the imposition of the tax by the adoption of the fiction of a transfer of the kind having occurred.

The original letter from the Treasury Department, dated October 13, 1932 (R. 93), stated:

> "There were issued as the consideration for the assets acquired 381,012 shares of your common no par value stock, as follows:
>
> | | |
> |---|---|
> | The Raybestos Company ..... | 267,012 shares |
> | The United States Asbestos Company | 114,000 |
> | Total ..... | 381,012 |
>
> *which shares were issued direct to the individual shareholders of the vendor corporations.*
>
> "In view of these shares of stock having been issued direct to the individual shareholders of the vendor corporation, *rather than to the corporations having the right to receive this stock*, there has been a transfer of a right to receive, and liability to transfer tax of 2c per share has been incurred under Schedule A-3 of Section 800 of the Revenue Act of 1926, on the number of shares so issued, namely 381,012 shares, the tax amounting to $7,620.24."

The letter of the Commissioner (R. 63) rejecting petitioner's claim for refund stated that (R. 64):

> "This office has uniformly held that in such a case the old corporations have the right to receive the stock issued in consideration for their assets and the issuance of such stock direct to the stockholders involves a transfer on the part of the corporations of their right to receive the stock."

This clearly shows that the Government recognized that the issuance of the stock was direct to the stockholders, but nevertheless contends a transfer of the "right to receive stock." This contention is made in the Brief of the United States filed herein where, on page 7, it states:

> "The well-established principle that the ownership of corporate property is in the corporation and not in the stockholders makes it clear that when the consolidating corporations sold their assets, the corporations and not the stockholders acquired the right to receive the new stock as the consideration, and transferred that right to their stockholders."

At once the false premise of the contention is disclosed. The person entitled to receive the stock is determinable by the contract between the person (a corporation or otherwise, and the stockholders in this instance) controlling the payment of the consideration for, and, the corporation who is to issue, the stock. Yet the Government contends (Brief p. 10):

> "The rule which we contend should be applied in this case is that when A corporation by agreement transfers its assets to B corporation in consideration for the issuance of stock by B to stockholders of A, *the transferor corporation acquires the right to receive the issued shares* which by the agreement it contemporaneously transfers to its stockholders."

That title to corporate property is in the corporation and not its stockholders is clear and admitted but this does not

"make it clear," as contended by the Government nor does it follow necessarily therefrom or at all that when a person (individual, corporation or otherwise) sells his or its assets to a corporation, which corporation, in consideration therefor, agrees to issue its stock, that the issue must necessarily be to the corporation paying the consideration. While it is the usual case that the one who pays the consideration receives the right to the issuance of stock this is not necessarily so. The Department has previously recognized that the person paying the consideration may have no right to receive the stock.

The situation appears to be precisely the same as that presented in the case covered by Office Decision 176, a ruling (by the Sales Tax Division of the Bureau of Internal Revenue) published in October, 1921. The decision in its entirety reads as follows (O. D. 176 S. T. 10-21-320):

> "In addition to other property rights conveyed, A conveyed to the corporation several parcels of real estate which he owned individually. The Corporation was capitalized for $500,000, the same being represented by 5000 shares of no par value stock of which 1000 shares were issued to each of his five children.
>
> "There was no privity of contract between A and his children, and under the terms of the contract which A had with the corporation the stock was in the first instance to be issued to the children. Hence A had at no time any right to receive such stock, and, therefore, could make no taxable transfer of such right."

This ruling was made in 1921. Section 800 of the Act of 1926 was passed five years after the rule of the Department had been thus established. In view of this fact, we refer to *Brewster* v. *Gage*, 280 U. S. 327; *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299; *U. S.* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, holding that the reenactment without change of a statute upon which rulings and regulations are based, is persuasive evidence that those rulings have obtained legislative approval.

No distinction between the case covered by the 1921 Office Decision 176 and the situation in the present case can be predicated upon the fact that there is a difference between the contractual powers of individuals and of corporations. If, however, it be urged that an individual can give away his property but that a corporation cannot do so, the answer is that the constituent companies did not give away their property but they contracted to convey it for a consideration which inured to the benefit of their stockholders.

It makes no difference that the consideration for the issuance of the stock was the transfer of the three old corporations' assets. They had the right to transfer their assets to petitioner for a consideration not moving to them.

The Government is not justified in adopting one fiction rather than another. It is much less justified in adopting any fiction. The Government cites no authority, and indeed there is none, for its proposition that where one corporation delivers assets to a second corporation and the consideration is to be the issuance of the second corporation's stock, that such stock must necessarily be issued to the first corporation. We again respectfully call attention to the principle recognized in Office Decision 176 (*supra*). The fact that the transferor of the property is a corporation rather an individual is immaterial. This principle was recognized in the case of *Westmoreland Coal Co.* v. *MacLaughlin*, 8 Fed. Supp. 963, and others referred to below.

The Raybestos Company and the United States Asbestos Company were parties to the contract with petitioner solely because they held legal title to the assets to be assigned to petitioner. The stockholders of the two corporations were the real parties in interest, and their authorization was a vital prerequisite to the validity of the transaction, for the laws of the State of the incorporation of The Raybestos Company and the United States Asbestos Company, *i. e.*, Connecticut and Pennsylvania, respectively, require the consent of the stockholders to the alienation of all the assets

held by corporations. (Section 3384 of Chapter 191 of The General Corporation Law of Connecticut, General Statutes of Connecticut—Revision of 1930; and sections 302 and 311 of Article III of the Business Corporation Law of Pennsylvania.) The consent of such stockholders did not give the corporations the right to receive the stock of petitioner—they reserved that right to themselves, and hence the two corporations did not at any time possess any right which they could transfer.

b. *No such transfer occurred.*

The Government contends that even if the principle of *Westmoreland Coal Co.* v. *MacLaughlin*, 8 Fed. Supp. 963, is correct, nevertheless, the tax was correctly imposed against petitioner upon the wording and terms of the contract. The Government makes much in its brief (Brief, pp. 14-16) of a few phrases carefully lifted out of the extended letters, plans and agreements used in connection with the consolidation of a $20,000,000 business. An analysis of each particular phrase in its proper setting clearly shows that contrary to the Government's contention the phrases quoted strengthen petitioner's contention that there was no transfer by the old corporations of any rights to receive stock, that the parties contemplated not such a transfer but only an issuance direct to the stockholders of the old corporations.

Petitioner, by the agreement of September 9, 1929 (R. 82), was to

> "deliver to the Company or upon its order certificates for * * * shares * * * which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company * * *"

The Government contends (Brief p. 15) that this "states in effect" that the delivery of "petitioner's stock direct to

the stockholders of the consolidating corporations was to be made pursuant to the order of those corporations." The clause quoted states no such thing "in effect" or otherwise. The draftsman of the agreement of September 9, 1929, had in mind the clear difference between a share of stock and the certificate which might evidence it; which difference the Government has apparently overlooked in this matter. It is necessary to quote at length from the paragraph (R. 82) to show with what care the draftsman distinguished between the delivery of the certificates and the issuance of shares of stock:

> "In exchange therefor, pursuant to said plan, (a) you will *deliver* to the Company or upon its order *certificates* for 267,012 shares of your Common Stock without par value, which *certificates will be delivered* for account of and will represent shares of such *stock issued directly to the holders of common stock of the Company,* pursuant to said Plan, on the basis of two and one-fourth shares of your Common Stock for each share of the Company's common stock held by each such stockholder and *you will issue, in lieu of any fraction of a share* of your Common Stock *issuable to any stockholder* of the Company, non-voting and non-dividend bearing *Common Stock Scrip,* exchangeable in amounts calling for one or more full shares for a certificate for such share or shares; provided that, if any stockholder of the Company whose stock shall not be voted in favor of such sales shall demand payment for his stock, you will *in lieu of the delivery* to the Company *of the certificate for* your *Common Stock and Common Stock Scrip issuable to such stockholder* on the basis above stated, pay to the Company for distribution to such stockholder pursuant to the Plan such sum in cash as in accordance with the laws of Connecticut shall be payable to him on account of his stock of the Company, such payment to be made forthwith upon the determination of its amount."

The intention is clear; the new corporation, *i. e.*, the petitioner, is to "deliver * * * certificates" and to "issue * * *

stock." The certificates are to be delivered to the "Company or its order" while the stock is to be issued to the shareholders. The delivery of the certificates to the "company or its order" is clearly, from an understanding of the mechanics of the transaction, a delivery to an escrow holder. The reason is obvious for the employment of the convenient and usual business device of an escrow to effect the delivery of petitioner's stock upon surrender of stock of the old corporations. The disadvantage resulting from any one of the merging corporations obtaining a block of the petitioner's stock equal to perhaps a third of all outstanding stock is likewise obvious; the practical control of the new corporation could be obtained by this means. The provision for persons entitled to fractions of shares and the provisions for non-depositing stockholders evidences the intent of the parties that the stock was to be issued to the stockholders direct and not to the old corporations.

In considering the above it is necessary to keep in mind that the law taxes the transfer of "*legal title* to shares or certificates of stock." Mere *delivery* of a certificate to an escrow holder is not a transfer of legal title.

Even were it conceded that there was some sort of fictitious, assumed, hypothetical or constructive intermediate transfer by the old corporations to their stockholders, which is not the case, such a transfer would not come within the terms of the statute. The law is explicit. It does not comprehend transfers created by legal or bureau fiction. It embraces only transfers of legal title, and none of the corporations ever had legal title to the right to receive the new stock.

Section 800 of the Revenue Act of 1926 imposes a stamp tax "on all sales, or agreements to sell, or memoranda of sale, or deliveries of, or *transfers of legal title* to shares or certificates of stock * * * or *to rights* to subscribe for or *to receive* such shares or certificates."

What are the kinds of transfer upon which the tax is

imposed in the transfer clause of this provision? The phrase "transfers of legal title" governs each of the dependent phrases which follows it; and, therefore, the only grammatical construction of which the transfer clause of Section 800 is susceptible gives three types of taxable transfers:

(1) "Transfers of legal title to shares;"

(2) "Transfers of legal title . . . to rights to subscribe for . . . shares;" and

(3) "Transfers of legal title . . . to rights . . . to receive . . . shares."

There is no suggestion that this case falls within either of the first two classes. If it comes within any, it must come within the third. In this third class, however, we find that there must be not only a transfer of the right to receive but also a transfer of legal title to that right to receive. No theoretical or hypothetical or constructive right will do. In our case the legal right to receive, and the legal title to that right, could not have come into existence until the two old companies made their contract with the new corporation. By that contract the legal right and title was instantly vested in the individual stockholders. There is, therefore, no taxable transfer to them.

The controlling force of the requirement that "legal title" be the subject of the taxable transfer has been recognized in the following cases:

Union Trust Co. v. *Heiner*, 26 F. (2d) 391 (construing Schedule A-3 of the 1921 Act, which remained unchanged through 1926); and also

U. S. Radiator Corporation v. *State*, 208 N. Y. 144, 101 N. E. 783;

International Paper Co. v. *State*, 206 N. Y. S. 57 (construing the New York stamp transfer tax act which is worded similarly to the Federal statute).

* * *

The statutory language with reference to the transfer of legal title to "rights to subscribe for or to receive" shares

was plainly drawn with reference to the current financial and commercial practice, and inserted so as to cover, in addition to "shares or certificates of stock," the transfer of all "rights" thereunto appertaining. It has been customary for corporations, from time to time, in connection with their financing, to issue "rights" to additional securities to be thereafter issued to holders of securities already issued. These rights are generally represented by certificates either in bearer form or transferable in the same way stock certificates are transferable. They are traded in actively on the stock exchanges or otherwise. Obviously, it was these instruments the transfer of legal title to which Congress intended to tax. The law did not intend to tax transactions similar to that in the case at bar. The respondent imputes a significance to the phrase "rights to . . . receive" which is wholly unwarranted by the text of the statute.

(3) The right to receive the new shares vested in the stockholders from the moment of its inception, and the agreement for the conveyance of assets negatived any right of the corporations to receive the stock. No transfer of legal title to a right to receive could have been made by corporations which never had that right to persons who enjoyed it from the moment it came into existence.

The agreement of May 14, 1929, was entered into between The Raybestos Company, The Manhattan Rubber Manufacturing Company and United States Asbestos Company (R. 68). The stockholders of the three corporations were not parties to such agreement between the three old corporations. The agreements dated September 9, 1929 (R. 80) were entered into between the new corporation, on the one hand, and The Raybestos Company and the United States Asbestos Company, on the other hand. The letter from the president of each of the old corporations to the stockholders of their respective corporations disclosed the general nature of the proposed consolidation; enclosed with

it was a copy of the "Plan and Agreement," which was between a committee, on the one hand, and the stockholders who should deposit their stock, on the other hand.

There was thus no privity of contract between the old corporations and their stockholders relating to the stock end of the transaction, and under the terms of the agreement between the old corporations and the acceptance of their offers by the new corporation, the stock was to be issued in the first instance directly to the stockholders. Hence, the old corporations had at no time any right to receive the stock; and, therefore, they could make no taxable transfer of such right. The clause in the agreement of May 14, 1929, between the old corporations, covering the issuance of the stock, reads as follows:

> "2. The capitalization of the consolidated company shall consist of 1,000,000 shares of common stock, such shares to be of no par value and all of one class. Of such authorized stock 631,012 shares *shall be issued in exchange for or replacement of the shares of common stock of the companies now outstanding,* and 45,000 shares shall be sold for cash, as hereinafter provided.

The stock then outstanding belonged to the stockholders. Pursuant to this agreement, two of the old corporations (The Raybestos Company and United States Asbestos Company) made their offer to the petitioner on September 9, 1929, containing the following (R. 82):

> "In exchange therefor, pursuant to said plan, (a) you will deliver to the Company or upon its order, certificates for 267,012 shares of your Common Stock without par value, which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company, pursuant to said Plan, on the basis of two and one-fourth shares of your Common Stock for each share of the Company's common stock held by each such stockholder and you will issue, in lieu of any fraction of a share of your Common Stock issuable to any stockholder of the Company, non-voting and non-divi-

dend bearing Common Stock Scrip, exchangeable in amounts calling for one or more full shares for a certificate for such share or shares; provided that, if any stockholder of the Company whose stock shall not be voted in favor of such sale shall demand payment for his stock, you will in lieu of the delivery to the Company of the certificate for your Common Stock and Common Stock Scrip issuable to such stockholder on the basis above stated, pay to the Company for distribution to such stockholder pursuant to the Plan such sum in cash as in accordance with the laws of Connecticut shall be payable to him on account of his stock of the Company, such payment to be made forthwith upon the determination of its amount."

(It is to be noted that shares of stock are to be *issued* as distinct from *delivery* of certificates.)

Both offers were formally accepted in writing by petitioner.

There was ample reason for the provisions of the contract. It was undesirable that any one of the old corporations should receive a single block of stock equal, in case of one of the old corporations, to more than one-fourth of the stock of the new corporation, and in case of the other two, to more than one-third each. These large blocks of stock could have been held by the directors of the old corporations virtually in the capacity of voting trustees; it was deemed inadvisable that this should occur.

The Government's theory is that no matter what form the transaction assumed, the old corporations could not divest themselves of the right in the first instance to receive the consideration for the conveyance made by them. It is true that the companies could not have divested themselves of their assets in a manner which would have deprived their stockholders of their interests, but as long as those interests were protected, any legal means could have been adopted. The method which was used followed the established principle that two or more persons may contract for the benefit of third parties.

The stockholders were protected, and they were entitled to and did receive directly the consideration for the transfer of assets made by the two corporations for the benefit of the stockholders. Even though it be asserted that the rights of the stockholders were derived ultimately from their interests in the old corporations, no departmental assumption, deduction or legal fiction can be supplied to suggest that at any time there was a "transfer of the legal title of the right to receive the new shares." The legal title never vested in any one other than the stockholders themselves.

The answer to our question is found in the established principles of law governing contracts, corporations and the relationship between corporations and their stockholders. The facts involved and the principles cited in the following cases present a situation identical with that here under review:

a. *Fletcher* v. *Newark Telephone Co.*, 55 N. J. E. 47, 35 Atl. 903.

The Newark Mutual Telephone Company contracted with the defendant, Newark Telephone Company, to convey to the latter its entire business and franchises in consideration of the assumption of its liabilities and the agreement of the new corporation "to pay and deliver therefor to the stockholders of the said Mutual Telephone Company, the stock of the Newark Telephone Company, share for share, and issue the same to the stockholders of the said Mutual Telephone Company upon surrender of their certificates of stock" in the old corporation.

The plaintiff, who was a stockholder in the old corporation, sued the new corporation for the shares in it to which he was entitled. The defendant demurred, claiming among other things that the old corporation should have been made a party to the suit. The court held that the plaintiff was entitled to specific performance of the agreement and that it was not necessary to join as a party either the old corporation or any of the other stockholders. Concerning the

position of the old corporation, the court, speaking through Vice-Chancellor Pitney, later Justice of the United States Supreme Court, said:

> "Nor can I perceive any ground for holding that the old corporation is a necessary party to the suit. The bill alleges that it has stripped itself of all its property and franchises, by assignment and transfer to the defendant, and that the contract here sued upon was made directly with the complainant and the defendant. But if by the true construction of the contract, or if the proof should finally be that the contract was made between the two corporations, but for the benefit of the individual stockholders of the old company, I should still be inclined to the opinion that the old company was not a necessary party, and that each stockholder could sue individually for the stock due to him, basing this right upon the contract made by the old corporation for his or her benefit. No relief is or can be, upon the facts, prayed against the old corporation, nor is it at all affected by the result of the suit. Presumably, its stockholders accepted the promise of the new company to issue certificates of stock to them, severally, as full satisfaction of all claims they held against the old company. And certainly, upon the statement of the facts contained in the bill, the performance of the defendant's contract with each of the old stockholders is a complete discharge of any claim the old company may have against the new company."

The governing force of this case is patent. The old corporation conveyed to the new in consideration of the latter's issuance of its stock, share for share, directly to the stockholders of the old. One of the stockholders, failing to receive the shares to which he was directly entitled, sued the new corporation and the point was raised that the old corporation should have been joined. The court, speaking through one of its most eminent chancellors, held that the old corporation was in no way involved, that the stockholder could obtain nothing through it, and that the contract for the issuance of the shares could be discharged only by the

new corporation. In the light of this ruling, it can not be argued that *legal title* to the right to receive the new shares passed from the new corporation to the old and, in turn, from the old corporation to the stockholders. If *legal title* did so pass, the old corporation would have been not only a proper, but a necessary party and the court would have been bound to require it to be joined.

b. *Anthony* v. *American Glucose Co.*, 146 N. Y. 407; 41 N. E. 23.

This case involved a transfer by five corporations of all of their property and business to a newly organized corporation in consideration of the issuance directly to the stockholders of the old corporations of shares of stock in the new corporation. The necessary consent of all of the stockholders was obtained, and the agreement of the new corporation to issue its stock was coupled with the condition that the stockholders should surrender their stock in the old corporations. The plaintiff, a shareholder in one of the old corporations, sued the new corporation for the shares which were due him and the court held that he was entitled to a decree of specific performance. In construing one of the terms of the agreement between the corporations and the consent of the stockholders, the court said:

> "It did not mean, in violation of that agreement and in contempt of the specific authority conferred, that the new stock should be issued to the old companies. It could not mean anything so absurd. They were powerless to surrender the stock of their share holders in exchange; and to say that the new stock was to be issued to the shells of the corporations, having no stockholders to whom it could distribute it unless to the new Glucose Company itself, which alone could purchase the surrendered certificates, is to say that the individual corporators meant to throw away, and utterly waste their rights."

The court then adds:

"When the Glucose Company came into existence, it had made no contract, and was bound by no obligation. It was free to buy out the five companies on any terms it could secure, but chose to adopt those offered by such companies and their corporators. It knew accurately what those terms were, in all their details. Almost every member of the board had been a party to the arrangement, and participated in framing it; and so, with full knowledge, it adopted the contract offered, completely and as a whole. It formally accepted the preliminary contract made between the companies, knowing that it vested only on condition of an issue of stock to the corporators * * * It is thus a mistake to say that the Glucose Company dealt only with the five corporations. It dealt also, and necessarily, with the individual corporators whose consent it required, and obtaining it on condition of payment to them, and with full knowledge of that condition, became obligated to each stockholder to issue to him his due and proportionate share of Glucose Company stock * * *

"It is said that the four companies * * * should have been made parties defendant. I do not see that the corporations have the slightest interest in this controversy. The general term thinks them dissolved and dead. I do not go so far; but, if the hollow and empty shells had life enough to stand up before the court as parties defendant, at least they had no interest in the dispute, and are in no manner affected by its results.

This case is singularly apposite. In it, as in ours, the necessary consent of the stockholders was obtained and the agreement for the direct issuance of stock by the new corporation to the shareholders was conditioned upon the surrender of their shares in the old corporations. The court held that when the new corporation accepted offers made by the old corporations for the direct issuance of shares to the stockholders the right to receive the assets vested in the new corporation and the right to receive the shares vested in the shareholders, not in the old corporations. The old corporations are described as "hollow and

empty shells" without "life enough to stand up before the court as parties defendant" with "no interest in the dispute and . . . in no manner affected by its results." This decision has been frequently cited and never challenged. The ruling applied is recognized by the text writers as an established principle in the law of corporations. Applying the rule to this case, will it be contended that in spite of the fact that the old corporations had stripped themselves of their assets and were hollow and empty shells with no interest in the performance by the new corporation of its obligation to issue the shares, nevertheless, legal title to the shares had to pass in the first instance to the old corporations? Legal title not only did not but could not have passed to the old corporations. If it did not pass to them it could not have been transferred by them, and without the transfer of legal title there is no warrant for the imposition of the tax.

(4) The stamp transfer tax is an excise tax levied upon the privilege of making a transfer from one person to another. If no privilege be exercised, and no transfer be made, there is nothing to which the tax can attach. No liability can arise without an actual transfer as distinguished from a constructive or implied or hypothetical one.

Since title to the shares of stock in the new corporation was derived by the shareholders directly from the issuing corporation, it passed through the hands of no one else, and under the terms of the agreements it could not have done so. There is, therefore, nothing to which the tax could attach except the property itself, and this would result in an invalid direct tax. The suggestion that a step be supplied, which was not taken and which would have been contrary to contractual obligation and official requirement, is purely gratuitous.

A stamp tax is an indirect or excise tax arising out of the actual exercise of a privilege which a taxpayer is free to

exercise or not as he chooses. If the taxable privilege be actually exercised, the tax attaches. If not there is no liability. In our case, no intermediate transfer actually occurred, and no double privilege could have been exercised in a single transaction.

The Supreme Court has recognized in many decisions that stamp taxes and excise taxes, generally, are privilege taxes which are imposed only when the privilege sought to be taxed is actually exercised.

In *Thomas* v. *United States*, 192 U. S. 363, the court held that the stamp tax imposed by the Act of June 13, 1898, on a memorandum or contract of sale of a certificate of stock was an excise tax. In describing the tax, the court said:

> "There is no occasion to attempt to confine the words duties, imposts, and excises to the limits of precise definition. We think that they were used comprehensively to cover customs and excise duties imposed on importation, consumption, manufacture, and sale of certain commodities, *privileges*, particularly business transactions, vocations, occupations, and the like. . . ."
>
> "The sale of stocks is a particular business transaction in the exercise of the *privilege* afforded by the laws in respect to corporations of disposing of property in the form of certificates. *The stamp duty is contingent on the happening of the event of sale, and the element of absolute and unavoidable demand is lacking.* As such it falls, as stamp taxes ordinarily do, within the second class of the forms of taxation."

In considering excise taxes, the courts have taken particular care to ascertain the precise privilege taxed in order to confine the application of the tax to the exact object contemplated by the statute.

Thus, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, involving the Corporation Excise Tax Act of 1909, the court said:

> "The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corpo-

rate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. As we said in the *Thomas* case, 192 U. S. 363, *the requirement to pay such taxes involves the exercise of privileges*, and the element of absolute and unavoidable demand is lacking. *If business is not done in the manner described in the statute, no tax is payable.*"

In *Nicol* v. *Ames*, 173 U. S. 509, in passing upon the tax imposed by the Act of 1898 on sales at exchanges, the court said:

> "In searching for proper subjects of taxation to raise moneys for the support of the Government, Congress must have the right to recognize the manner in which the business of the country is actually transacted; how, among other things, the exchange of commodities is effected; what facilities for the conduct of business exist; what is their nature, and how they operate; and *what, if any, practical and recognizable distinction there may be between a transaction which is effected by means of using certain facilities, and one where such facilities are not availed of by the parties in the same kind of a transaction.*"

In *Cliquot Club Co.* v. *U. S.*, 13 F. (2d) 655, the court considered the character of the beverage tax imposed by the Revenue Act of 1918, and said (p. 656):

> "That the tax is an excise laid upon the privilege of selling rather than of manufacturing beverages is clear. *It attaches only when there is a transfer of title in the commodity.*"

The opinion in *Knowlton* v. *Moore*, 178 U. S. 41, by Justice White, later Chief Justice, contains a most scholarly and comprehensive discussion of the nature of the tax on "Legacies and Distributive Shares of Personal Property" imposed by the War Revenue Act of June, 1898, and includes a valuable history of death duties and their application in this country and in Europe. Justice White said:

"Looking over the whole field, and considering death duties in the order in which we have reviewed them,—that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several States of the Union,—the following appears: Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, of the act of passing of an estate or a succession, legacy taxes, estate taxes, or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. . . . The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate."

After holding that the legacy tax under review was not a direct tax but a duty or excise, the opinion considers the nature of excise taxes generally:

"Excises usually look to a particular subject, and levy burdens with reference to the act of manufacturing them, selling them, etc. They are or may be as varied in form as are the acts or dealings with which the taxes are concerned."

The case is a leading case, and it is of particular value in the consideration of our question for the importance which it attaches to the precise determination of the particular object or thing upon which an excise tax is imposed.

United States v. *Isham*, 17 Wall. 496, involved a provision of the Act of June 30, 1864, imposing a stamp tax of two cents on certain checks, drafts or orders drawn for a sum exceeding $10. The defendant issued annually orders in denominations of $1, $2, $3, $5 and $10, in an amount

aggregating about $100,000. No draft or order was issued for a sum exceeding $10, and it was contended that the instruments were taxable on the ground that the intentional use of small denominations was a device to avoid payment of the duty.

The court held first (p. 504) that:

> "The liability of an instrument to a stamp duty, as well as the amount of such duty, is determined by the form and face of the instrument, and cannot be affected by proof of acts outside of the instrument itself."

In response to the Government's contention that the instruments, although not actually within the definition of the act, might constructively be brought within it, the court said (p. 506):

> "If the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate: The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditors two checks of ten dollars each. He thus draws checks in payment of his debt to the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations deprive the Government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment and thus to avoid the tax. The device we are considering is of the same nature."

Billings v. *United States*, 232 U. S. 261, is another case which illustrates the necessity of ascertaining precisely the subject matter of the tax in order to determine its proper incidence. It involves the duty imposed upon the use of foreign-built yachts owned by American citizens. The

court distinguishes between ownership and use and holds that the privilege exercised in the use of a foreign-built yacht is the basis of the tax. Whether the decision in the case be rested upon this ground or on the ground that the excise was properly levied as a luxury tax, the opinion demonstrates the broad proposition for which we are here contending, namely, that an excise tax is imposed upon a privilege and that it is only when the taxable privilege is actually exercised that the tax can be levied. The court said:

> "Upon what was it (the tax) assessed is the question. It seems difficult to answer it in clearer terms than does the text of the act when it provides that it shall be upon the use of the yachts with which the provision is concerned. But it is said to respond in the language of the act leaves the question virtually unanswered, since the extent of the use and its essential period are left wholly undetermined. But this is a misconception based upon a disregard of the fact that the word 'use' in the text is unqualified, from which it results that the recurrence of the tax is annual and depends upon two elements,—ownership or charter rights, as specified in the act, and use for any time during the year. It is to be observed that the provision deals with ownership, and distinguishes between ownership and use, since it bases the tax not upon the former, but upon the latter. From this it follows that *it is not ownership, but the election during the taxing period of the owner to take advantage of one of the elements which are involved in ownership,—the right to use which is the subject upon which the statute places the excise duty.* . . . While this construction in this case leads to the same conclusion as does that which the court below affixed to the statute, that is, that it taxed the privilege of use, or, in other words, the potentiality of using involved in ownership, inherently there is this fundamental difference between the interpretation we give and that which the lower court adopted, *since the privilege of use is purely passive (or subjective),—a right which necessarily pertains to ownership and must exist where there is ownership, as one may not obtain ownership without acquiring the privileges of use*

which ownership gives. The other, on the contrary, that is, use in the statutory sense; although it arises from ownership, is active (objective); that is, it is the outward and distinct exercise of a right which ownership confers, but which would not necessarily be exerted by the mere fact of ownership.'' (pp. 280-281.)

The cases we have reviewed involving excise taxes establish several propositions which are applicable to our case:

(1) The courts take the greatest care and make the most minute analysis to determine exactly what the statute taxes;

(2) An excise tax is levied on a particular act, or transaction, or a single element in a transaction, consisting in each case of the exercise of a privilege;

(3) The tax does not attach unless the precise act is present and the taxable privilege is actually exercised;

(4) The form of the transaction controls; and

(5) No tax is payable if the transaction takes a form which avoids a tax to which the transaction in another form would be subject.

The basis of the stamp tax sought to be applied in this case is the transfer of the legal title to the right to receive shares of stock. We believe we have shown that there was not and could not have been an actual transfer of the legal title to the right to receive the shares of stock of the New Jersey corporation.

(5) Cases involving this precise question have held that no tax was possible.

In circumstances similar to those involved in this action, three recent cases, two by Circuit Courts of Appeal, have decided against the government's claim that a transfer of a right to receive stock occurred, and held that the facts did not support the tax.

In *Minnesota Mining & Mfg. Co.* v. *Willcuts*, 2 F. Supp. 789, a Delaware corporation had been organized to take

over the assets of a Minnesota corporation. The transaction was effected by a surrender of Minnesota stock in exchange for Delaware stock issued directly to the stockholders of the Minnesota corporation through the agency of a committee. The government contended that since the Minnesota corporation had furnished the consideration for the issuance of the stock it had the primary right to receive the stock, and a tax upon an asserted transfer of that right to its stockholders was assessed and collected. The District Court for the District of Minnesota held that the Minnesota corporation had never acquired any right to receive the stock and could not have transferred any such right.

> "In connection with the stock in question, there was a single movement only. That was directly from the corporation issuing the certificates, the Delaware corporation, to the individuals who were entitled thereto under the arrangement made by the voluntary committee. There was no vesting in the Minnesota corporation, as such, of any right to, or interest in, or power of disposition as to, the stock in question. There were no 'sales * * * or transfers of legal title to shares or certificates of stock * * * or of legal title to rights to subscribe for or to receive such shares or certificates,' by the Minnesota company. The latter had no such legal title and no such rights. It could not make any such sales or transfers to others, and it made no attempt so to do. The tax, therefore, was unwarranted" (p. 791).

In *Westmoreland Coal Co.* v. *MacLaughlin*, 8 F. Supp. 963, a corporation made an offer to transfer its assets to a newly organized corporation in consideration of the issuance of its stock to the old corporation. The new corporation, instead of accepting this offer as it was made, resolved to take the assets and to issue the stock *to the stockholders* of the old corporation. The transaction was actually carried out on this basis. Here again the government insisted that the old corporation had the primary right to receive

the stock and that a transfer of that right to its stockholders had occurred and was subject to tax. The District Court for the Eastern District of Pennsylvania ruled otherwise:

> "It is quite clear that the plaintiff never acquired the right to receive the stock in question. It could only have gotten it by virtue of some contract binding on the Delaware corporation and there was no contract which gave it. True, the plaintiff had offered to transfer its assets in exchange for such right, but the reply was, 'No, we will accept your assets but we will give the stock to your stockholders, not to you,' and the plaintiff acquiesced. *It is perfectly competent for a corporation, with the consent of all its stockholders, to agree to sell its assets for a price and to stipulate that the price shall not be paid to it but to third parties, particularly where those third parties are the stockholders themselves.* Certainly, the plaintiff acquired an enforceable right as a result of its transaction with the Delaware corporation, but that right was not to receive shares of stock for itself, but to require them to be issued to its stockholders. This right, of course, was not transferred and is not taxable. Though not on all fours, the case of Minnesota Mining & Manufacturing Co. v. Willcuts (D. C.), 2 F. Supp. 789, is much closer in its facts than the Marconi Case" (p. 964).

This decision was affirmed, 73 F. (2d) 1004, by the Circuit Court of Appeals for the Third Circuit in a *per curiam* decision, as follows:

> "Trial by jury was waived, and the case formally submitted to the court. Holding that the stipulated facts sustain the court's findings, its judgment is affirmed on the reasoning of its opinion."

Shreveport-El Dorado Pipe Line Co. v. *McGrawl*, 63 F. (2d) 202 (C. C. A. 5), involved a reorganization in which a Louisiana corporation in exchange for the assets of a Delaware corporation, issued its capital stock proportionately to the stockholders of the Delaware corporation. The gov-

ernment's right to collect a stamp tax upon an asserted transfer of rights to receive stock was denied.

Coos Bay Lumber Company v. *McLaughlin*, No. 19,268-K, was decided in plaintiff's favor on November 22, 1934, by the United States District Court for the Northern District of California. The main issue involved was the same as in this case. Outstanding bonds of the Coos Bay Lumber Company had come into the possession of a bondholders' committee. The committee entered into a reorganization agreement with the Lumber Company which provided that the Company would issue its stock directly to a group of trustees for the bondholders in consideration of the surrender by the committee to the Company of the bonds held by it. The Government argued, as it does here, that the committee or the bondholders had the right to receive the stock upon surrender of the bonds and must be deemed to have transferred it to the trustees. The court held otherwise. The case was presented for the taxpayer by William Denman, now a member of the Circuit Court of Appeals for the Ninth Circuit.

Vortex Cup Company v. *United States*, 1935 C. C. H. paragraph 9582, was decided in plaintiff's favor on July 17, 1935, by the United States District Court for the Northern District of Illinois. The issue involved was the same as in this case.

Contrary rulings in clearly distinguishable cases are found in *Marconi Wireless Telegraph Co.* v. *Duffy*, 273 Fed. 197; *Consolidated Equities* v. *White*, 9 F. Supp. 145; and *Hormel & Co.* v. *United States*, 10 F. Supp. 623.

The agreements in each of these cases between the old corporation and the new corporation provide for issues of stock in the new corporation to the old corporation or its order. Thereafter the old corporation ordered that the stock be issued directly to its stockholders. In such cases a transfer of a right to receive stock may well have occurred. The situation is clearly distinguishable from this case in which

the agreement between the corporations provided in its inception for an issuance of stock directly to the stockholders of the old corporations; in such a case as this the old corporation acquires no right to receive stock and can transfer none.

The opinion in *United States* v. *Brown Fence and Wire Co.*, 9 F. Supp. 1008 (D. C. N. D. Ohio), indicates that the agreement provided for the issuance of the shares directly to the shareholders of the old corporation. The tax was upheld, evidently on reliance on the *Marconi* case as against the *Westmoreland* case in the District Court. As this case was decided on January 18, 1935, it is reasonable to assume that the affirmation of the *Westmoreland* case, on December 1, 1934, by the Circuit Court of Appeals for the Third Circuit, had not been called to the court's attention; at least, the court's only reference is to the decision of the District Court. This is the only case we know in which the ruling may be against us.

The cases cited by the Government in its brief, *United States* v. *Phellis*, 257 U. S. 156, and *Rockefeller* v. *United States*, 257 U. S. 176, are income tax cases and have no bearing on the present subject.

CONCLUSION.

The essence of this case lies in the fact that the Government has sought to tax "the transfer of the legal title to the right to receive stock"—a transfer which never took place. There never was any "right to receive stock" until September 9, 1929. That right was never "transferred" to the stockholders but on its creation was vested in the stockholders of the two predecessor corporations. The stockholders did not transfer this right. The stock was issued to them directly. Such was the nature of the transaction. Undoubtedly there was only one taxable transaction, the issuance of the stock itself. On that transaction the tax was paid. The New York courts hold under a stat-

ute almost identical with the Federal statute that, on original issue there cannot also attach liability for the transfer tax. *People* v. *Duffy-McInnerney Co.*, 106 N. Y. Supp. 878, 879; 122 App. Div. 336. The Court said:

> "A sale or a transfer cannot, except by forced interpretation, be held to include an original issuance of certificates, which are simply evidence of the interest of the subscribers in the corporation. *Until those certificates are once issued they cannot be made the subject of such sale or transfer as to bring them within the provisions of the act requiring them to pay the tax.*"

The Government's attempt to collect another tax upon the same transaction in the guise of a "transfer of the legal right to receive stock" cannot be sustained.

It is respectfully submitted that the judgment of said Court of Claims should be reversed by this Honorable Court.

CHARLES H. LEFEVRE,
Counsel for Petitioner.

Dated, Washington, D. C.
October 19, 1935.

APPENDIX A.

STATEMENT.

The findings of fact of the Court of Claims (R. 66-75) may be summarized as follows:

The petitioner is a New Jersey corporation, organized in 1929, with a total authorized capital stock of 1,000,000 shares of common stock (R. 66). For many years prior to petitioner's incorporation three separate and distinct corporations, namely, The Raybestos Company, a Connecticut corporation, The Manhattan Rubber Manufacturing Company, a New Jersey corporation, and the United States Asbestos Company, a Pennsylvania corporation, existed and carried on business; each was owned, controlled and operated by entirely distinct and different interests, stockholders and directors; none had any interest, direct or indirect, in the business, assets or properties of the others (R. 66).

On May 14, 1929, The Raybestos Company, The Manhattan Manufacturing Company, and the United States Asbestos Company entered into a written agreement, signed by the president of each company respectively, subject to the necessary action by directors and stockholders, which provided for the formation of a corporation (petitioner) to acquire all the assets and carry on the businesses of each of the three companies (R. 68). The agreement provided for the capitalization of the new corporation and for the basis of the issuance of its stock for or in replacement of stock of the three existing corporations (R. 68-69). The agreement appears in the Record at pages 6-9. The board of directors of each corporation approved the agreement. Thereafter, the agreement was submitted for approval or rejection to the stockholders of each of the corporations by means of form letters mailed to holders of common stock of the corporations, enclosing copies of a "Plan and Agreement", dated May 22, 1929 (R. 70). (Copies of the letters

and "Plan and Agreement" appear on pages 9-60 in the Record.) The agreement in the "Plan and Agreement" was between a committee of three, on the one hand, and such stockholders who should deposit their stock, on the other. The letters and the "Plan and Agreement" provided that a new corporation would acquire all the assets and liabilities of the three existing companies; the "Plan and Agreement" further provided that the assent of the stockholders thereto should be by the deposit of their stock certificates with the committee of three. The agreement further provided that when all the terms and conditions of the "Plan and Agreement" had been complied with "depositors will be entitled to receive, upon the consummation of the plan, and upon surrender of their certificates of deposit, the stock and scrip for fractions of shares of stock, of the New Company (but only as and when issued and ready for delivery) to which they shall be entitled pursuant to the terms and provisions of the plan and this agreement" (R. 70-71).

All the stockholders of each of the corporations approved the consummation of the plan as submitted, and each deposited his stock certificate or certificates with the appropriate Depository pursuant to the terms and conditions set forth in the "Plan and Agreement" (R. 71-72).

The petitioner was incorporated in New Jersey on July 5, 1929, assumed the obligations and liabilities, and acquired all the business and assets of the three older corporations (R. 72-73).

The business and assets of The Manhattan Rubber Manufacturing Corporation were acquired by a merger of that corporation with the petitioner under the provisions of the General Corporation Act (as amended) of New Jersey (R. 72). The petitioner issued 250,000 shares of the petitioner's stock (R. 72) ratably and directly to the stockholders of the outstanding 200,000 shares of The Manhattan Rubber Manufacturing Company common stock.

The business and assets of The Raybestos Company

were acquired by proper deeds, assignments, bills of sale, and other instruments executed and delivered by The Raybestos Company (R. 72-73). The petitioner issued 267,012 shares of the petitioner's stock ratably and directly to the stockholders of the outstanding 118,672 shares of The Raybestos Company common stock (R. 73). The transaction was in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and pursuant to a contract entered into between the petitioner and The Raybestos Company dated September 9, 1929 (R. 73). The contract of September 9, 1929, provided that The Raybestos Company would transfer to the petitioner all its assets, business, and good will, and in exchange, that the petitioner would deliver "certificates" for 267,012 shares of petitioner's common stock "to the Company (The Raybestos Company) or upon its order * * * which certificates will be delivered for account of and will represent shares of such stock issued directly to the holders of common stock of the Company" (R. 73). (A copy of the contract of September 9, 1929 appears in the Record at pages 80-86.)

The business and assets of United States Asbestos Company were acquired by means of proper deeds, assignments, bills of sale, and other instruments executed and delivered by United States Asbestos Company. The petitioner issued 114,000 shares of the petitioner's stock, ratably and directly to the stockholders of the outstanding 100,000 shares of the United States Asbestos Company common stock (R. 73-74). The transaction was in pursuance of the agreement dated May 14, 1929, the "Plan and Agreement" dated May 22, 1929, and a contract entered into between the petitioner and United States Asbestos Company dated September 9, 1929 (R. 74). The contract of September 9, 1929, contained the same provisions, as adapted to United States Asbestos Company, as did the contract with The Raybestos Company (Record 74).

The petitioner paid a tax of five cents a share on each share of stock issued by it, which tax it concedes was legal-

ly imposed under Schedule A-2, Section 800 of the Revenue Act of 1926 (R. 75).

The United States Asbestos Company was dissolved on September 27, 1930 (R. 75). The Raybestos Company has not been dissolved but has continued in existence because of certain non-assignable patent rights (R. 75). The Manhattan Rubber Manufacturing Company was, as before stated, merged with the petitioner (R. 75).

On October 13, 1932, the petitioner was notified by letter from the Bureau of Internal Revenue that petitioner was subject to a transfer tax of two cents a share under Schedule A-3 of Section 800 of the Revenue Act of 1926 on the shares of its stock issued "direct to the individual shareholders" of The Raybestos Company and the United States Asbestos Company (R. 93). No claim was made for a tax on the shares acquired by the former stockholders of The Manhattan Rubber Manufacturing Company. The petitioner paid the tax of $7,620.24, with interest of $165.11, under protest on May 8, 1933 (R. 74). On May 15, 1933, the petitioner filed a claim for refund of the tax and interest on the ground that there had been "no real transfer of a corporate interest or of a right to acquire it," and that the tax did not attach (R. 74-75). The Commissioner rejected petitioner's claim for refund on December 12, 1933 (R. 75).

Petitioner filed in the Court of Claims, on March 4, 1935, its claim that the tax paid was illegally withheld from it. The Court of Claims dismissed the petition (R. 80).

The bare facts above, when summarized further, may be said to be: Three corporations agreed to transfer their assets, together with their liabilities, to a new corporation in consideration of the new corporation issuing its shares of stock ratably to the three corporations' stockholders who agreed to the surrender of their shares of stock in the old corporations upon their receiving in replacement stock in the new corporation.

APPENDIX B.

Statute Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9, 99, 101:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.)

* * * * * * * * *

SCHEDULE A.—STAMP TAXES

* * * * * * * * *

3. Capital stock, sales, or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not, on each $100 of face value or fraction thereof, 2 cents, and where such shares are without par or face value, the tax shall be 2 cents on the transfer or sale or agreement to sell on each share: Provided, That it is not intended by this title to impose a tax upon an agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certifi-

cates are not actually sold, nor upon the delivery or transfer for such purpose of certificates so deposited, nor upon mere loans of stock nor upon the return of stock so loaned: Provided further, That the tax shall not be imposed upon deliveries or transfers to a broker for sale, nor upon deliveries or transfers by a broker to a customer for whom and upon whose order he has purchased same, but such deliveries or transfers shall be accompanied by a certificate setting forth the facts:

* * *

(U. S. C. App., Title 26, Sec. 901.)

Regulations Involved.

Treasury Regulations 71 (1929 Edition), Article 35.

ART. 35. *Sales and transfers not subject to tax.*—The following transactions are not subject to the tax:

(*a*) The transfer of stock pursuant to a sale, where the previous memorandum of sale has been duly stamped.

(*b*) The sale or transfer of enemy-owned shares of stock in American corporations to or by the Alien Property Custodian.

(*c*) The surrender of certificates in exchange for other certificates representing the same or new stock, provided they are issued to the same holders.

(*d*) The surrender of the stock of the consolidating corporation in exchange for stock in the consolidated corporation, in the case of consolidation of two or more corporations.

(*e*) The transfer of the stock of a merged corporation in exchange for stock of the merging corporation at the time and as a part of a statutory merger is not subject to tax, nor is the substitution of new certificates for the certificates representing the old stock of the merging corporation.

(*f*) The surrender of stock for extinguishment or in exchange for new certificates to be issued without change of owernship.

(*g*) The transfer of certificates of stock from the decedent to the administrator or executor of the estate.

(*h*) The transfer of shares or certificates of stock

from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the trust agreement, which is a transfer resulting wholly by operation of law.

(*i*) An agreement evidencing a deposit of certificates as collateral security for money loaned thereon, which certificates are not actually sold, is not subject to tax, nor is the delivery or transfer for such purpose of the certificates so deposited, nor the mere loan nor return of stock so loaned subject to tax: *Provided*, That in each case the person making a transfer of such certificates shall make and sign a statement of the facts and attach it to the certificate.

(*j*) The transfer or delivery of certificates to a clearing house for the sole purpose of clearing or adjusting accounts, where no beneficial interest is vested in such clearing house and there has been no change of title or interest.

(*k*) The mere delivery of a certificate of stock by or on behalf of a customer to his broker solely for the purpose of enabling such broker to make a sale thereof for the customer where the broker has no ownership or interest therein, is not subject to stamp tax and does not require an exemption certificate. The transfer of a certificate of stock from the name of the owner thereof to the name of a broker, solely for the purpose of enabling such broker to make a sale thereof for the owner, is not subject to tax, provided the broker shall in every case, at the time of such transfer to him, make and sign a certificate stating that he has no ownership in such stock and that the transfer to him was made solely to enable him to sell the stock for the owner. Such certificate shall in every case be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer and shall be preserved, together with the old certificate, by such transfer agent, for the inspection of the revenue officer.

(*l*) The mere delivery of a certificate of stock from a broker to his customer for whom he has purchased such certificate, and when such broker has no ownership or interest therein, is not subject to the stamp tax and does not require an exemption certificate. The trans-

fer of a certificate of stock from the name of a broker to the name of his customer for whom and upon whose order he has purchased such stock, where the tax has been paid upon the transfer of the stock to the broker, is not subject to tax, provided that the broker shall in every case, at the time of such transfer from him, make and sign a certificate stating that the transfer from the broker to his customer is made solely to complete the purchase made by such broker for such customer. Such certificate in every case shall be attached to the certificate of stock and presented to the transfer agent at the time such certificate of stock is surrendered for transfer, and shall be preserved, together with the old certificate, by such transfer agent for the inspection of the revenue officer.

(*m*) The certificates required by the two preceding paragraphs shall be in the following form:

(1) (In the case of a transfer to a broker)—

We hereby certify that we have no ownership or interest in * * * shares of the stock above transferred, the transfer by the owner to us being merely for the purpose of sale.

.....
(Broker sign here)

(2) (In the case of a transfer by a broker)—

We hereby certify that the transfer * * * of the within shares to the names indicated by t[illegible]star is made solely to complete the purchase made [illegible]s for our customer, and we have no ownership o[illegible]terest therein.

.....
(Broker sign here)

(*n*) No broker who has filed a certificate on the form given in paragraph (1) shall file a certificate on the form given in paragraph (2) with relation to the same transfer of shares of stock.

(*o*) A "call" is an agreement to sell and is taxable; but a transfer of a certificate of stock pursuant to the "call" is not taxable, being only a fulfillment of the original agreement. The seller shall execute and attach to the certificate of stock his certificate, which

shall be accepted by the transfer agent and shall be preserved by him for inspection of the revenue officer. The certificate here prescribed shall be in the following form:

> We hereby certify that the transfer of....shares of the within stock to.....has been made pursuant to a "call," and that the Federal stock transfer stamps for the transaction are affixed to such "call," which is in our possession.

(*p*) Where, under paragraph (*k*) of this article, a certificate of stock standing either in the name of the owner or any other person has been delivered by the owner thereof to a broker for sale, and subsequently, under paragraph (*l*) of this article, such certificate has been delivered by a broker to his customer for whom it is purchased and the tax has been paid upon the delivery of such certificate from the seller's broker to the buyer's broker, the transfer of such certificate of stock into the name of the buyer is not subject to tax: *Provided*, That either requisite stamps shall have been affixed to the certificate of stock upon its delivery to the buyer's broker or the memorandum of sale evidencing the transaction between the seller's broker and the buyer's broker, with the requisite stamps affixed thereto, shall have been attached to such certificate at such time and presented to the transfer agent at the time such certificate is surrendered for transfer. The old certificate, together with the memorandum of sale, if used, shall be preserved by such transfer agent for the inspection of the revenue officer.

(*q*) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

(*r*) Where trustees hold as joint tenants upon the death of one title devolves upon the survivor. Such devolution constitutes a transfer by operation of law not subject to tax.

(*s*) Transfer of stock from maiden name to married name of stockholder.